# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1936

## No. 79

CLARENCE G. KUNSMAN, APPELLANT,

*vs.*

MAX FACTOR & CO., AND SALES BUILDERS, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MAY 25, 1936.

# SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[File endorsements omitted]

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**IN SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES**

No. 363006

MAX FACTOR & Co., a Corporation, and SALES BUILDERS, INC., a Corporation, Plaintiffs,

vs.

CLARENCE G. KUNSMAN, JOHN DOE, JANE DOE and THE BLACK CORPORATION, a Corporation, Defendants

AMENDED COMPLAINT—Filed January 2, 1934

Come now the plaintiffs in the above entitled action, and for cause of action against the defendants, allege:

I

That the plaintiff Max Factor & Co. now is and at all times since on or about the 1st day of January, 1929, has been a corporation duly organized and existing under and by virtue of the laws of the state of Delaware, United States of America, and authorized to do business as a foreign corporation in the state of California, and having its principal office and place of business in the city of Los Angeles, county of Los Angeles, state of California.

II

That the plaintiff Sales Builders, Inc., now is and at all times since on or about the 7th day of October, 1927, has been a corporation duly organized and existing under and by virtue of the laws of the state of Nevada, United States of America, and authorized to do business as a foreign corporation in the state of California, and having its principal office and place of business in the city of Los Angeles, county of Los Angeles, state of California.

III

That the true names of the defendants, John Doe, Jane Doe and the Black Corporation, a corporation, sued herein under fictitious names are unknown to plaintiff, and when such true names are ascertained, plaintiffs will ask leave of court to amend this complaint and insert them herein.

[fol. 3]

IV

That the plaintiffs are informed and believe, and therefor allege that The Black Corporation, now is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the state of California.

V

That for many years prior to the 1st day of January, 1929, one Max Factor, was a manufacturer of cosmetics and toilet articles, in the state of California. The said Max Factor did adopt certain trade-marks for the said cosmetics and toilet articles manufactured by the said Max Factor. That the said trade-marks were registered according to the laws of the United States of America, at the Patent Office of the United States of America, Washington, D. C., and the said Max Factor was granted the exclusive ownership and right to use the said trade-marks in the United States of America. That said trade-marks, and the number of the certificates issued by the United States of America, and the date of the issuance, are as follows:

| Trade Marks | United States Patent Office Certificate Number | Date Certificate Was Issued |
|---|---|---|
| Brillox | 192,086 | March 1, 1924 |
| Max Factor's Supreme and Shield | 221,654 | December 5, 1925 |
| The Cosmetics of The Stars | 240,856 | April 10, 1928 |
| Max Factor's | 241,483 | May 1, 1928 |
| Panchromatic | 250,508 | December 11, 1928 |
| Pancro | 250,507 | December 11, 1928 |
| Monotone | 259,208 | July 23, 1929 |
| Max Factor's Sum'r Tan and Device | 263,770 | November 12, 1929 |

| Trade Marks | United States Patent Office Certificate Number | Date Certificate Was Issued |
|---|---|---|
| Technicolor | 265,225 | December 17, 1929 |
| X-Scent | 292,237 | March 8, 1932 |
| Factor | 292,325 | March 15, 1932 |
| Max | 292,646 | March 21, 1932 |
| Society | 256,865 | May 28, 1929 |

[fol. 4]

VI

That on or about the 1st day of January, 1929, the said Max Factor sold, transferred and assigned the said trade-marks and all of his right, title and interest in and to the same, to the plaintiff, Max Factor & Co. That the said plaintiff, Max Factor & Co., since the said date, continued the manufacture of the said cosmetics and toilet articles theretofore manufactured by the said Max Factor, and has continued the use of the trade-marks adopted by the said Max Factor as heretofore set forth. That the said plaintiff, Max Factor & Co., in addition thereto, adopted two (2) more trade-marks for the said cosmetics and toilet articles manufactured by the plaintiff, Max Factor & Co. That the said trade-marks were registered according to the laws of the United States of America, at the Patent Office of the United States of America, Washington, D. C., and the said plaintiff, Max Factor & Co., was granted the exclusive ownership and right to use the said trade-marks in the United States of America. That said trade-marks, and the number of the certificates issued by the United States of America, and the date of the issuance, are as follows:

| Trade Marks | United States Patent Office Certificate Number | Date Certificate Was Issued |
|---|---|---|
| Telivision | 303,699 | June 6, 1933 |
| Brounette | 303,694 | June 6, 1933 |

VII

That the said plaintiff, Max Factor & Co., at all times since the said 1st day of January, 1929, has been and still is engaged in the business of manufacturing, for the purpose of selling in all of the states of the United States of

America, and elsewhere, certain cosmetics and toilet articles, among them the following:

Astringent
Bleach Mask
Brillox
Cleansing Cream (all kinds)
Compact (Vanity—all shades)
Compact (Loose Powder)
Eau de Cologne
Eyebrow Pencil (purse-size & regular all shades)
Eyelash Make-Up (all shades)
Eyeshadow (all shades)
Face Powder (all shades)
Face Powder Brush
Hand Lotion
[fol. 5] Honeysuckle Cream
Lip Pomade (all shades)
Lip Stick (Super-Indelible—all shades)
Lip Stick (Waterproof Permanent—all shades)
Make-Up Blender (all shades)
Masque (all shades)
Melting Cleansing Cream
Powder Foundation Cream (all shades)
Rouge (Society & Prof.—all shades)
Rouge Refill (for Vanity—all shades)
Skin & Tissue Cream
Skin Freshener
Vanishing Cream
Theatrical Cold Cream

That the said plaintiff, Max Factor & Co., is the sole owner of the trade-marks hereinbefore described, and has the exclusive right to use the said trade-marks in the state of California, and in all of the states of the United States of America, and the said plaintiff, Max Factor & Co., has at all times since the said 1st day of January, 1929, used the said trade-marks in connection with the manufacture, sale and distribution of the cosmetics and toilet articles hereinabove described. That at all times since the 1st day of January, 1929, the said plaintiff, Max Factor & Co., was and still is the sole owner of the business and good will, in the state of California, and in all of the states of the United States of America, associated with the distribution

and sale of the said cosmetics and toilet articles manufactured by the said plaintiff, Max Factor & Co., and associated with the trade-marks used by it, in said manufacture, sale and distribution.

VIII

That the plaintiff, Sales Builders, Inc., was known as Max Factor Sales Co., prior to on or about January 21, 1930, at which time the name of the said plaintiff was changed to Sales Builders, Inc.

IX

That on or about October 7, 1927, Max Factor as an individual, sold, transferred and assigned to the plaintiff, Sales Builders, Inc., the exclusive right and privilege of distributing and selling in all of the states of the United States of America, including the state of California, the cosmetics and toilet articles then and thereafter manufactured by the said Max Factor, and the good will pertaining thereto, together with the right to use the trade-marks used and/or adopted by the said Max Factor in connection with the said business of distributing and selling, associated with all of the said trade-marks, and the sole right to sell and distribute in all of the states of the United States of [fol. 6] America, the said cosmetics and toilet articles manufactured by the said Max Factor; and the said Max Factor further covenanted and agreed not to sell or ship to any person, firm or corporation, in any of the states of the United States of America, including the state of California, or for sale in any of the states of the United States of America, including the state of California, other than to the plaintiff, Sales Builders, Inc., or on its order, any of the cosmetics and/or toilet articles then or thereafter manufactured by the said Max Factor. That at the time that the said plaintiff, Max Factor & Co., was incorporated, the said plaintiff, Max Factor & Co., assumed and entered into the same covenants and agreements with the said plaintiff, Sales Builders, Inc., that had been entered into theretofore between the said Max Factor, and the plaintiff, Sales Builders, Inc. That at all times since the said 1st day of January, 1929, the plaintiff, Sales Builders, Inc., has been the sole owner of the exclusive right to sell and

distribute in all of the states of the United States of America, including the state of California, all of the cosmetics and toilet articles manufactured by the said plaintiff, Max Factor & Co., and associated with the use of the said trade-marks originally adopted by the said Max Factor and subsequently assigned to the plaintiff, Max Factor & Co., as hereinabove set forth. That the cosmetics and toilet articles specifically set forth in paragraph VII, bear on the labels, attached to the said cosmetics and toilet articles, the trade-marks hereinbefore described. The one (1) trade-mark used principally by the said plaintiff, Max Factor & Co., is "Max Factor's", all of which trade-marks, as hereinbefore set forth are duly registered as such, under the laws of the United States of America, in the United States Patent Office, at Washington, D. C. That the plaintiff, Sales Builders, Inc., as hereinbefore set forth, has the sole ownership of the right to sell and distribute in all of the states of the United States of America, including the state of California, the said cosmetics and toilet articles, so trade-marked, as hereinabove set forth.

X

That the said cosmetics and toilet articles manufactured by the said plaintiff, Max Factor & Co., have been and now are sold and distributed by the said plaintiff, Sales Builders, Inc., generally throughout all of the states of the United States of America, including the state of California, by wholesale and retail druggists, and the said cosmetics and toilet articles enjoy a good reputation and standing among said druggists and the public generally. That the said cosmetics and toilet articles are, and at all times mentioned in this complaint have been, in fair and open com- [fol. 7] petition throughout the state of California with commodities of the same general class produced by others than said plaintiffs or either of them.

XI

That the defendants now are, and at all times hereinafter mentioned were the owners, proprietors and operators of a retail drug store, situated at No. 8802 Wilshire boulevard, in the city of Beverly Hills, state of California, engaged in the sale at retail to consumers of cosmetics and toilet ar-

ticles and other merchandise, which said business is operated under the fictitious firm name and style of Wilshire Drug Co.

XII

That many years ago there developed in the drug trade a practice of cutting prices, both wholesale and retail, of well advertised commodities, well known to the public and sold and identified under distinctive trade-marks, brands and names. That such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called "leaders" for the purpose of creating the impression that other goods, of which the prices were not well known, were sold at corresponding reductions, and that all articles dealt in by a particular dealer were sold by him at less than they could be obtained elsewhere. That the stores at which said practices were prevalent became known as "Cut Rate Drug Stores." That said practice of cutting known and established prices engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade-marks, brands and names with an established price were offered at prices cut to a point which yielded no profit, and in many cases represented a loss. That said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their declining to handle or stock the same, and caused said dealers, when said commodities were called for by the public, to sell the same reluctantly, or to substitute, where possible, other products upon which profit could be made. That as a further result of said price cutting, the producer or owner of such identified merchandise whose goods had been handled in this manner, through no fault of his own, was deprived of a market and facilities for distribution, and his business and good-will seriously interfered with and in many cases destroyed. That the situation above described is particularly true in the state of California with respect to cosmetics and toilet articles, and extended gradually to [fol. 8] other lines of merchandise. That to remedy this evil the Legislature of the state of California passed an act entitled "An Act to Protect Trade-mark Owners, Dis-

tributors and the Public against Injuries and Uneconomic Practices in the Distribution of Articles of Standard Quality under a Distinguished Trade-mark, Brand or Name." Said act was approved on May 8, 1931, became effective August 14, 1931, is known as the "Fair Trade Act," and is chapter 278 of the Statutes of California of 1931. That the said "Fair Trade Act" was amended by the Legislature of the state of California, which said amendments were approved on May 8, 1933, and became effective August 21, 1933.

XIII

That on or about the 21st day of August, 1933, plaintiff Sales Builders, Inc., to protect its trade in the state of California, in trade-mark goods, and to protect itself against the injuries and uneconomic practices in the distribution thereof contemplated by the said "Fair Trade Act" hereinabove referred to, and to avail itself of the protection and terms and provisions thereof, did adopt the system of doing business as hereinafter described; that in said system of business written contracts were entered into between the plaintiff, Sales Builders, Inc., and its wholesale or jobbing distributors, and between the plaintiff, Sales Builders, Inc., and the retail druggists, and/or other persons, firms or corporations selling the said products manufactured by plaintiff, Max Factor & Co., hereinabove described, in the state of California. That said wholesale and jobbing distributors are obligated to sell the said plaintiff, Max Factor & Co., products only to retailers who will resell the same at specified prices and who have entered into a written contract with the plaintiff, Sales Builders, Inc., to sell the said plaintiff, Max Factor & Co., products at the said specified prices. The plaintiff, Sales Builders, Inc., has entered into contracts with the retail druggists and other firms, persons or corporations engaged in the retail business of selling cosmetics and toilet articles under the terms of which contracts the said retail dealers are obligated to sell the said plaintiff, Max Factor & Co., products at specified prices. A specimen of the contract entered into between the plaintiff, Sales Builders, Inc., and the wholesale or jobbing distributors is attached hereto, marked Exhibit "A"; a specimen of the contract entered into with the retailers is hereto attached, marked Exhibit "B." That the

prices fixed and established by plaintiff, Sales Builders, Inc., in said contracts are fair and reasonable, and no higher than is required to yield to distributors at wholesale and retail a reasonable compensation for their services. That the goods sold by plaintiff, Sales Builders, Inc., are com- [fol. 9] modities within the terms of the "Fair Trade Act" and bear the trade-marks, brands or names of the said plaintiff, Max Factor & Co., as hereinbefore set forth, and are in fair and open competition with commodities of the same general class produced by others. That practically all the wholesale druggists in the state of California have executed said wholesale distributors' contract, a specimen of which is hereto attached, marked Exhibit "A," and practically all the retail druggists in the state of California have executed said retail distributors' contract, a specimen of which is hereto attached, marked Exhibit "B." That included among said retailers are the prominent department stores dealing in cosmetics and toilet articles. That the said wholesale and retail druggists are observing and conforming with the terms of the said contracts and price cutting on plaintiff, Max Factor & Co., products has ceased, and, except as hereinafter stated, plaintiff, Sales Builders, Inc., is now enjoying, under the terms of the "California Fair Trade Act," a reasonable profit in the sale of its goods and immunity from destructive and uneconomic price cutting, the distribution of its goods has been unobstructed, and its business has been greatly benefited. That the wholesale and retail dealers in said commodities, by reason of such contracts, are obtaining a reasonable compensation and profit on the sale of preparations distributed by plaintiff, Sales Builders, Inc., and they and plaintiff, Sales Builders, Inc., have enjoyed and are continuing to enjoy freedom from price cutting and unfair competition, except as hereinafter set forth. That the plaintiff, Sales Builders, Inc., has refused and will refuse to sell the said plaintiff, Max Factor & Co., products to any and all wholesalers and jobbing distributors who do not execute the contract, a specimen of which is hereto attached, marked Exhibit "A," and plaintiff, Sales Builders, Inc., has refused and will refuse to sell the said plaintiff, Max Factor & Co., products to any and all retailers of cosmetics and toilet articles who do not execute the contract, a specimen of which is hereto attached, marked Exhibit "B."

XIV

That defendants, before the inauguration of the method of doing business by the contracts hereinbefore described, were retail distributors of plaintiffs' goods and made a pretense of selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of said commodities, to defendants, with the result that other dealers were forced to meet defendants' price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendants. That upon the adoption of plaintiff, Sales Builders, Inc.'s, system of contracts, as aforesaid, a con- [fol. 10] tract in the form of Exhibit "B" was tendered to defendants and an opportunity given defendants to deal in plaintiffs' goods on the same terms offered to every other retail druggist in the state of California. That defendants declined to execute said contracts or to conform to the system of distribution adopted by plaintiff, Sales Builders, Inc., or to observe the prices fixed in said contracts. That since the establishment by plaintiff, Sales Builders, Inc., of said system of contracts, the defendants have repeatedly been requested to enter into a contract with plaintiff, Sales Builders, Inc., in the form hereto attached, as Exhibit "B," but said defendants have repeatedly refused to do so. That upon defendants' refusal to enter into said contract with plaintiff, Sales Builders, Inc., plaintiff, Sales Builders, Inc., declined and has continued to decline to sell its commodities to defendants unless and until defendants enter into said contract with plaintiff, Sales Builders, Inc.

XV

That upon plaintiff, Sales Builders, Inc., declining to sell its commodities to defendants, except as aforesaid, defendants, who had full knowledge of the system of contracts adopted by the plaintiff, Sales Builders, Inc., and of the fact that substantially all wholesale and retail dealers in the state of California have executed such contract and are operating in conformity with the terms thereof, conceived a wrongful and unlawful plan and scheme of harming, injuring and destroying plaintiff, Sales Builders, Inc.,'s said business and good will in the state of California by disrupting said system of lawful contracts existing between

said plaintiff, Sales Builders, Inc., on the one hand, and its wholesale and retail distributors on the other. That defendants have proceeded and are proceeding to carry out said unlawful and wrongful scheme and plan in the manner more particularly hereinafter set out, and in so doing have been and now are acting maliciously and without legal justification therefor.

XVI

That in pursuance and as a part of said unlawful and wrongful plan and scheme, defendants have procured and now procure commodities manufactured by plaintiff, Max Factor & Co. bearing the trade-marks, brands and names of plaintiff, Max Factor & Co., as heretofore set forth, unbeknown to plaintiffs or either of them, and have continually sold and are now selling said commodities at prices less than the retail sales price described in the contract, a specimen of which is hereto attached marked Exhibit "B," which said retail prices are being abided by — substantially all of the retail dealers in cosmetics and toilet articles in the state of California, as hereinabove set forth. That the [fol. 11] sales of the said defendants are at sixty-nine cents (69¢) for one dollar ($1.00) items, forty-three cents (43¢) for fifty cent (50¢) items and twenty-nine cents (29¢) for fifty cent (50¢) items, the resale price of which, as set forth in Exhibit "B" is one dollar ($1.00) and 50 cents (50¢) respectively, and said sales are at a proportionate reduction for any and all of the items described in said Exhibit "B." That plaintiff, Sales Builders, Inc., is informed and believes and therefore alleges that the cost to defendants of the said plaintiff, Max Factor & Co. products so sold by the said defendants is greater than the cost to the said defendants would be under a contract with the plaintiff, Sales Builders, Inc., as aforesaid.

XVII

That in further pursuance of the unlawful and wrongful plan and scheme, defendants have been and now are engaged in informing retail dealers under contract with plaintiff, Sales Builders, Inc., as well as the public generally of defendants' intention to sell plaintiffs' goods at the cut prices aforesaid.

XVIII

That the said acts of the defendants hereinbefore alleged are unlawful and unduly influencing the retail and wholesale distributors of plaintiff, Max Factor & Co., products, and the said wholesale and retail distributors have complained that they will be compelled to cancel the contracts with plaintiff, Sales Builders, Inc., hereinabove referred to, and to sell the said Max Factor products not in conformity with the terms of said contracts, but at prices which will meet those announced by the said defendants, and at which prices the said defendants sell at retail the said plaintiff, Max Factor & Co., products, the result of which will be a destruction of plaintiffs' businesses and the good will pertaining thereto. That unless the relief herein prayed for is granted the plaintiffs the said cancellations by the said wholesale and retail distributors will take place, and a large number, if not all of the lawful contracts of plaintiff, Sales Builders, Inc., will be cancelled by the said wholesale and retail distributors, who are now parties to the said contracts, and the destructive price cutting in force before said contracts were entered into will be resumed with the result that destructive and predatory price cutting of plaintiff, Max Factor & Co., products will then prevail, distribution of said goods will be obstructed, and plaintiffs' businesses and the good will pertaining thereto will be injured, if not wholly destroyed, and in addition thereto the wholesale and retail distributors will be prevented from obtain-
[fol. 12] ing and earning a reasonable profit in the sale and distribution of the said plaintiff, Max Factor & Co., products.

XIX

That on or about the 25th day of August, 1933, the said defendants received a written notice of the fact that the plaintiff, Sales Builders, Inc., was operating its system of business under the terms of the "Fair Trade Act" of the state of California, a copy of which notice is attached hereto, marked Exhibit "C" and incorporated herein as if specifically set forth at length. That since the receipt of the said notice by the said defendants, the said defendants have sold and disposed of plaintiff, Max Factor & Co., products at retail, as follows, to-wit:

Face powder for the sum of sixty-nine cents (69¢), the price of which, as set forth in Exhibit "B" and Exhibit "C", is one dollar ($1.00);

Rouge for the sum of forty-three cents (43¢), the price of which, as set forth in Exhibit "B" and Exhibit "C," is fifty cents (50¢);

Lipstick for the sum of twenty-nine cents (29¢), the price of which, as set forth in Exhibit "B" and Exhibit "C", is fifty cents (50¢).

That the sales so made by defendants as hereinabove in this paragraph and in paragraph XVI of this complaint set forth have not, nor have any of them, been made in closing out the stock of said defendants for the purpose of discontinuing delivering any commodities so sold, nor have the goods so sold or any of them been damaged or deteriorated in quality, nor has any notice of such damage or deterioration been given by the defendants to the public, nor have such sales or any of them been made by any officer acting under the orders of any court. That the defendants threaten to, and will, unless restrained by the order or judgment of this court, continue to sell and dispose of the products of said plaintiff, Max Factor & Co., at retail at prices less than the retail sales prices described in the contract, a specimen of which is hereto attached and marked Exhibit "B."

## XX

That the continuance by defendants of their unlawful and wrongful plan and scheme aforesaid, and of their acts in pursuance and as a part thereof, hereinbefore specifically alleged and set forth, will produce great and irreparable injury to plaintiffs in that it will be extremely difficult, if not impossible, to ascertain the amount of dam-
[fol. 13] age that will afford plaintiffs adequate relief for their loss of sales and the destruction of the businesses of plaintiffs and the good will pertaining thereto, which, as heretofore shown, will result from such acts of defendants. That, unless plaintiffs are granted equitable relief by way of injunction against the wrongs complained of, a multiplicity of actions at law will be necessary to enable plaintiffs to obtain any redress for the repeated and continuing wrongful acts of defendants. That for the same reasons plaintiffs are without an adequate remedy at law.

Wherefore, plaintiffs pray judgment as follows:

(1) That the defendants and each of them be restrained and enjoined from selling, advertising or offering for sale any of the commodities distributed by plaintiff, Sales Builders, Inc., in the state of California, or any commodity bearing any of the trade-marks, brands or names of plaintiff, Max Factor & Co., including the trade-marks registered at the United States Patent Office, Washington, D. C., at prices less than the resale prices prescribed in Exhibit "B", attached hereto, and/or that the defendants be restrained and enjoined from selling any of the commodities and from advertising and offering any of such commodities for sale.

(2) For an injunction pendente lite.

(3) For such other and further relief as may be meet, just and equitable in the premises.

(4) For costs of suit.

Henry Haves, Attorney for Plaintiffs.

*Duly sworn to by Louis Conrad. Jurat omitted in printing.*

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[fol. 14] EXHIBIT "A" TO AMENDED COMPLAINT

Agreement

This Agreement, Made and entered into between Sales Builders, Inc., hereinafter designated as Distributor, and —— ——, hereinafter designated as Wholesaler,

Witnesseth:

That, Whereas, distributor is exclusive distributor in the United States of America of Max Factor products, manufactured by Max Factor & Co., a corporation, and

Whereas, the parties hereto, for their mutual benefit and protection desire to cooperate with each other in the sale and distribution of the said Max Factor products, pursuant to the provisions of the "Fair Trade Act" of the State of California as enacted in 1931 and as amended in 1933.

Now, Therefore, pursuant to the provisions of the "Fair Trade Act" of the State of California, the parties hereto agree as follows:

(1) The wholesaler will not sell said Max Factor products except to retailers in the State of California, who have executed a contract with the distributor, the form of which is attached hereto, marked Exhibit "A."

(2) The distributor will notify the wholesaler of any and all retailers who have executed a contract in the form attached hereto, marked Exhibit "A"; and said wholesaler agrees not to sell any of the said Max Factor products to any retailer who has not executed the contract, a form of which is attached hereto, marked Exhibit "A," upon notice thereof from distributor.

(3) Distributor agrees to sell the said Max Factor products to the said wholesaler, at the following discounts.
Retail Price List.
Less 20%.
Less 15% and 5% net ten days.

(4) The Distributor expressly reserves the right to change the wholesale and retail selling prices of the Max Factor products, in the State of California, at any time, upon ten (10) days written notice.

(5) This agreement may be cancelled by either party by written notice to the other, but in the event of such cancellation, all of the Max Factor products in the possession of the wholesaler shall be sold by the said wholesaler to retailers, upon the conditions set forth herein.

In Witness Whereof, the parties hereto have hereunto placed their hands this — day of August, 1933.

Sales Builders, Inc., by —— ——, Distributor.
—— ——, Wholesaler.

[fol. 15] Agreement

In Accordance with, and pursuant to the provisions of the "Fair Trade Act" of the State of California as enacted in 1931, and as amended in 1933,

This Agreement is made and entered into between Sales Builders, Inc., hereinafter designated as Distributor, and —— ——, hereinafter designated as Retailer,

Witnesseth:

That, Whereas, Distributor is the exclusive distributor in the United States of America of the Max Factor products, manufactured and produced by Max Factor & Co., a corporation, and

Whereas, Retailer is a retailer of cosmetics and toilet articles in the State of California; and

Whereas, the parties hereto, for their mutual benefit and protection, desire to fix the prices of the Max Factor products sold at retail in the State of California,

Now, Therefore, the parties hereto agree as follows:

(1) The Retailer agrees to sell each of the following described Max Factor products at the price set opposite the description of each of the said products or articles:

| | | |
|---|---|---|
| Astringent | Lge. $2.00, Reg. | $1.00 |
| Bleach Mask | Lge. 2.00, Reg. | 1.00 |
| Brillox | Lge. 1.00, Reg. | .50 |
| Cleansing Cream (all kinds) | Lge. 2.00, Reg. | 1.00 |
| Compact (Vanity—all shades) | | 1.50 |
| Compact (Loose Powder) | | 1.00 |
| Eau de Cologne | | .75 |
| Eyebrow Pencil (purse-size & regular—all shades) | | .50 |
| Eyelash Make-Up (all shades) | | 1.00 |
| Eyeshadow (all shades) | | .50 |
| Face Powder (all shades) | | 1.00 |
| Face Powder Brush | | 1.00 |
| Hand Lotion | | .50 |
| Honeysuckle Cream | Lge. $2.00, Reg. | $1.00 |
| Lip Pomade (all shades) | | .50 |
| Lip Stick (Super-Indelible—all shades) | | 1.00 |
| Lip Stick (Waterproof Permanent—all shades) | | .50 |
| Make-Up Blender (all shades) | | 1.00 |
| Masque (all shades) | | .50 |
| Melting Cleansing Cream | | 1.00 |
| Powder Foundation Cream (all shades) | | 1.00 |
| Rouge (Society & Prof.—all shades) | | .50 |
| Rouge Refill (for Vanity—all shades) | | .25 |

| | | | |
|---|---|---|---|
| Skin & Tissue Cream | Lge. | 2.00, Reg. | 1.00 |
| Skin Freshner | | | 1.00 |
| Vanishing Cream | | | .50 |
| Theatrical Cold Cream | Lge. | .75, Reg. | .50 |

[fol. 16] And, or, any new Max Factor products at the manufacturer's established retail price.

(2) The Retailer will not sell said commodities or articles except at the price or prices hereinabove stipulated.

(3) The said prices are the only prices at which Max Factor products may be sold at retail in the State of California, and the said products and/or articles cannot be retailed at any other price or prices in the State of California.

(4) The Distributor expressly reserves the right to change the said retail selling prices of the Max Factor products in the State of California at any time upon ten (10) days written notice to Retailer by United States mail.

(5) Retailer agrees to sell the said Max Factor products at retail only within Retailer's own store or stores, and not otherwise.

(6) This agreement may be cancelled by either party upon written notice to the other, but in the event of such cancellation all of the Max Factor products in possession of the Retailer shall be sold by the said Retailer at the prices designated hereinabove, except as provided for in "Fair Trade Act."

In Witness Whereof the parties hereto have placed their hands and seals.

Dated at ——, California, this — day of ——, 193-.

Signature: —— ——, Distributor. Dealer's Name: —— ——. Signature: —— ——, Retailer.

Space for Dealer's Sticker.

[fol. 17] EXHIBIT "B" TO AMENDED COMPLAINT

Agreement

In Accordance with, and pursuant to the provisions of the "Fair Trade Act" of the State of California as enacted in 1931, and as amended in 1933,

This Agreement is made and entered into between Sales Builders, Inc., hereinafter designated as Distributor, and —— ——, hereinafter designated as Retailer,

Witnesseth:

That, Whereas, Distributor is the exclusive distributor in the United States of America of the Max Factor products, manufactured and produced by Max Factor & Co., a corporation, and

Whereas, Retailer is a retailer of cosmetics and toilet articles in the State of California; and

Whereas, the parties hereto, for their mutual benefit and protection, desire to fix the prices of the Max Factor products sold at retail in the State of California,

Now, Therefore, the parties hereto agree as follows:

(1) The Retailer agrees to sell each of the following described Max Factor products at the price set opposite the description of each of the said products or articles:

| | | |
|---|---|---|
| Astringent | Lge. $2.00, Reg. | $1.00 |
| Bleach Mask | Lge. 2.00, Reg. | 1.00 |
| Brillox | Lge. 1.00, Reg. | .50 |
| Cleansing Cream (all kinds) | Lge. 2.00, Reg. | 1.00 |
| Compact (Vanity—all shades) | | 1.50 |
| Compact (Loose Powder) | | 1.00 |
| Eau de Cologne | | .75 |
| Eyebrow Pencil (purse-size & regular—all shades) | | .50 |
| Eyelash Make-Up (all shades) | | 1.00 |
| Eyeshadow (all shades) | | .50 |
| Face Powder (all shades) | | 1.00 |
| Face Powder Brush | | 1.00 |
| Hand Lotion | | .50 |
| Honeysuckle Cream | Lge. $2.00, Reg. | 1.00 |
| Lip Pomade (all shades) | | .50 |
| Lip Stick (Super-Indelible—all shades) | | 1.00 |
| Lip Stick (Waterproof Permanent—all shades) | | .50 |
| Make-Up Blender (all shades) | | 1.00 |

| | | |
|---|---|---|
| Masque (all shades) | | .50 |
| Melting Cleansing Cream | | 1.00 |
| Powder Foundation Cream (all shades) | | 1.00 |
| Rouge (Society & Prof.—all shades) | | .50 |
| Rouge Refill (for Vanity—all shades) | | .25 |
| Skin & Tissue Cream | Lge. 2.00, Reg. | 1.00 |
| Skin Freshner | | 1.00 |
| Vanishing Cream | | .50 |
| Theatrical Cold Cream | Lge. .75, Reg. | .50 |

[fol. 18] And, or, any new Max Factor products at the manufacturer's established retail price.

(2) The Retailer will not sell said commodities or articles except at the price or prices hereinabove stipulated.

(3) The said prices are the only prices at which Max Factor products may be sold at retail in the State of California, and the said products and/or articles cannot be retailed at any other price or prices in the State of California.

(4) The Distributor expressly reserves the right to change the said retail selling prices of the Max Factor products in the State of California at any time upon ten (10) days written notice to Retailer by United States mail.

(5) Retailer agrees to sell the said Max Factor products at retail only within Retailer's own store or stores, and not otherwise.

(6) This agreement may be cancelled by either party upon written notice to the other, but in the event of such cancellation all of the Max Factor products in possession of the Retailer shall be sold by the said Retailer at the prices designated hereinabove, except as provided for in "Fair Trade Act."

In Witness Whereof the parties hereto have placed their hands and seals.

Dated at ——, California, this — day of ——, 193-.

Signature: —— ——, Distributor. Dealer's Name: —— ——. Signature: —— ——, Retailer.

Space for Dealer's Sticker.

[fol. 19] EXHIBIT "C" TO AMENDED COMPLAINT

## Notice

To Wilshire Drug Co., and to Whom It May Concern:

You and Each of You will please take notice that Sales Builders, Inc., is the distributor in the United States of America, of the products manufactured by Max Factor & Co., consisting of cosmetics, toilet articles, etc.

You Are Further Notified that the "Fair Trade Act" of the State of California was enacted in 1931 and amended in 1933.

You Are Further Notified that the said "Fair Trade Act" was enacted for the purpose of protecting the manufacturers, distributors and retailers of trade marked articles and products.

You Are Further Notified that Sales Builders, Inc. is entering into contracts with the retailers of cosmetics and toilet articles, for the purpose of protecting all concerned. A copy of said contract is enclosed herewith for your information, with a request that you execute the same.

According to the terms of the said contract, the Max Factor products are to be sold at retail at the prices as follows:

| | |
|---|---|
| Astringent | Lge. $2.00, Reg. $1.00 |
| Bleach Mask | Lge. 2.00, Reg. 1.00 |
| Brillox | Lge. 1.00, Reg. .50 |
| Cleansing Cream (all kinds) | Lge. 2.00, Reg. 1.00 |
| Compact (Vanity—all shades) | 1.50 |
| Compact (Loose Powder) | 1.00 |
| Eau de Cologne | .75 |
| Eyebrow Pencil (purse-size & regular—all shades) | .50 |
| Eyelash Make-Up (all shades) | 1.00 |
| Eyeshadow (all shades) | .50 |
| Face Powder (all shades) | 1.00 |
| Face Powder Brush | 1.00 |
| Hand Lotion | .50 |
| Honeysuckle Cream | Lge. $2.00, Reg. 1.00 |
| Lip Pomade (all shades) | .50 |
| Lip Stick (Super-Indelible—all shades) | 1.00 |
| Lip Stick (Waterproof Permanent—all shades) | .50 |
| Make-Up Blender (all shades) | 1.00 |

| | | |
|---|---|---|
| Masque (all shades) | | .50 |
| Melting Cleansing Cream | | 1.00 |
| Powder Foundation Cream (all shades) | | 1.00 |
| Rouge (Society & Prof.—all shades) | | .50 |
| Rouge Refill (for Vanity—all shades) | | .25 |
| Skin & Tissue Cream | Lge. 2.00, Reg. | 1.00 |
| Skin Freshner | | 1.00 |
| Vanishing Cream | | .50 |
| Theatrical Cold Cream | Lge. .75, Reg. | .50 |

[fol. 20] Practically every retailer of cosmetics and toilet articles in the State of California is executing the contract, a copy of which is enclosed herewith.

Heretofore you have been requested to enter into a similar contract, but have refused. If you do not enter into this contract, Sales Builders, Inc. will be unable to sell you the said Max Factors Products, and in addition thereto, if you obtain any of the Max Factor products and sell the same at less than the prices enumerated herein, legal proceedings will be instituted, for the purpose of enjoining you, and collecting damages for such injury as Sales Builders, Inc. may sustain by reason of your said acts.

You may govern yourself accordingly.

Dated at Los Angeles, California this 24th day of August, 1933.

(Sd.) Henry Haves, Attorney for Sales Builders, Inc.

[File endorsement omitted.]

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[fol. 20-a] In Superior Court of Los Angeles County

Demurrer to Plaintiffs' Amended Complaint—Filed January 15, 1934

Comes now the defendant Clarence G. Kunsman, and for demurrer to plaintiffs' amended complaint alleges as follows:

I

That said amended complaint does not state facts sufficient to constitute a cause of action.

Dated January 12, 1934.

Bart F. Wade, Attorney for Defendant Clarence G. Kunsman.

I certify that the foregoing demurrer is made in good faith and that in my opinion the same is well taken.

Bart F. Wade.

Points and Authorities

Section 430, Code of Civil Procedure.

Endorsed: Received copy of the within demurrer this 15 day of Jan., 1934. Henry Haves (S. R.)

[File endorsement omitted.]

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[fol. 21] In Superior Court of Los Angeles County

[Title omitted]

Order Sustaining Demurrer—January 19, 1934

Demurrer to amended complaint, transferred from Department 44, comes on for hearing; Henry Haves appearing as attorney for plaintiffs and Bart F. Wade for defendants. Said demurrer is sustained without leave to amend.

Clerk's certificate to foregoing paper omitted in printing.

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[fol. 21-a] In Superior Court of Los Angeles County

Judgment—Filed February 2, 1934

The above entitled cause having come on regularly for hearing on the 19th day of January, 1934, before the court, sitting in Department 47 thereof, on defendant's Clarence G. Kunsman demurrer to plaintiffs' amended complaint; Henry Haves, Esquire, appearing on behalf of plaintiffs and Bart F. Wade, Esquire, appearing on behalf of the defendant Clarence G. Kunsman, and the said demurrer having been argued and fully submitted to the court, and the court being fully advised thereupon, having made and entered its order sustaining defendant's said demurrer to plaintiffs' amended complaint, without leave to amend; and it appearing that the action has been dismissed as to the fictitious defendants;

Now, therefore, by virtue of the law and by reason of the premises aforesaid;

It is ordered, adjudged and decreed that plaintiffs have and recover nothing from the defendant Clarence G. Kunsman, and that the plaintiffs, and each of them, be denied [fol. 22] any and all relief prayed for in their said amended complaint, and that defendant Clarence G. Kunsman have judgment for his costs and disbursements incurred herein.

Dated at Los Angeles, California, this 2d day of February, 1934.

Emmet H. Wilson, Judge of Said Court.

[File endorsement omitted.]

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[fol. 22-a] IN SUPERIOR COURT OF LOS ANGELES COUNTY

NOTICE OF APPEAL—Filed February 8, 1934

To the Defendant, Clarence G. Kunsman, and to Bart F. Wade, Esq., His Attorney:

You and each of you will please take notice that the plaintiffs, Max Factor & Co., a corporation, and Sales Builders, Inc., a corporation, hereby appeal to the Supreme Court of the state of California from all and every part of the judgment made and entered against said plaintiffs in the above entitled action in favor of the defendant, Clarence G. Kunsman. Said judgment was entered on February 5, 1934, in book 874 at page 213 of judgments, in the office of the county clerk of Los Angeles county. Said plaintiffs hereby appeal from the whole and every part of said judgment.

Dated at Los Angeles, California, this 8th day of February, 1934.

Henry Haves, M. C. Sloss, Sloss & Turner, by Henry Haves, Attorneys for Plaintiffs.

Endorsed: Received copy of the within notice this 8th day of February, 1934. Bart F. Wade, K., attorney for defendant.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF CALIFORNIA

L. A. No. 14662. In Bank

MAX FACTOR & Co. (a Corporation), and SALES BUILDERS, INC. (a Corporation), Plaintiffs and Appellants,

v.

CLARENCE G. KUNSMAN, Defendant and Respondent

[fol. 24] This cause presents an attack upon the provisions of the "Fair Trade Act" adopted by the legislature in 1931 (Stats. 1931, p. 583; Deering's Gen. Laws, Act 8782), as amended in 1933 (Stats. 1933, p. 793; Deering's Gen. Laws, Act 8782).

OPINION—February 28, 1936

Prior to the adoption of these provisions, the legislature adopted an act commonly known as the "Cartwright Act", in order to promote free competition in commerce, which, among other things, declares it to be unlawful for two or more persons to enter into any combination or contract by which they agree to establish the price of any commodity to the public or consumer, and declares any such combination or contract to be against public policy, and void. (Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; Deering's Gen. Laws, Act 8702.) The Fair Trade Act departs widely from the restrictive provisions of the Cartwright Act, in that it provides (in section 1) that "no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trademark, brand, or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California" by reason of any provision which may be contained in such contract, among others, (1) "that the buyer will not resell such commodity except at the price stipulated by the vendor;" and (2) "that the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee. This statute, as originally passed, limits its application to persons who volun-

tarily enter into such contracts with respect to such resale prices, thus apparently seeking to except such contracts from the application of accepted principles respecting combinations and monopolies restraining trade through price-fixing agreements. The amendment to the Fair Trade Act added in 1933, designated as section 1½, presents the crucial point of this case. It reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

These facts appear from the allegations of the complaint: The plaintiff, Max Factor & Co., a Delaware corporation, engaged in the manufacture of cosmetics and toilet articles manufactured by it under certain adopted and registered trade-marks. These trade-marks have long been used in connection with the manufacture, sale and distribution of the cosmetics and toilet articles manufactured and sold by the corporation; that the corporation is the sole owner of the business and good-will in the state of California and all the states in the United States connected with the distribution and sale of the articles associated with such trade-marks; that prior to the commencement of this action, Max Factor & Co. transferred and sold to the plaintiff Sales Builders, Inc., the exclusive right and privilege of distributing and selling in the states of the United States, including the state of California, the cosmetics and toilet articles then and thereafter manufactured by Max Factor & Co., and the good-will pertaining thereto, with the right to use the trade-marks, and the sole right to sell and distribute the cosmetics and toilet articles in all these states. Plaintiff Sales Builders, Inc., has ever since been, and is, the sole owner of the exclusive right to sell and distribute in all of the states, including California, all of the cosmetics and toilet articles manufactured by the plaintiff Max Factor & Co., and associated with the use of the trade-marks adopted by Max Factor & Co.

The defendant is, and at the times mentioned has been, the owner, proprietor and operator of a retail drug store

situated in the city of Beverly Hills in this state, and was, and now is, engaged in selling at retail to consumers of cosmetics, toilet articles and other merchandise.

For many years there has developed in the drug trade in California the practice of cutting prices, both wholesale and retail, of well-advertised commodities well known to the public, and sold and identified under distinctive trade-marks, brands and names. Such products have been, and are, offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called "leaders", for the purpose of creating the impression that other goods of which the prices are not so well known are sold at corresponding reductions, and that all articles dealt in by the particular dealer are sold by him at less than they could be obtained elsewhere. The stores in which these practices are prevalent have become known as "cut-rate drug stores." The complaint here sets out at some length matter relative to the fact that the practice of cutting known and established prices has engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut producing another in retaliation, so that ultimately, in a particular community, well-known articles identified by trade-marks, brands, and names with an established price are offered at [fol. 25] prices cut to a point which yields no profit, and in many cases represents a loss. Other alleged evils of the practice are set forth at length. It is also alleged that to remedy this evil the legislature of California has enacted the Fair Trade Act, supra, the constitutionality of which act is here sought to be established.

In order to protect itself against the alleged injuries and uneconomic practices described in the complaint, plaintiff Sales Builders, Inc., adopted a system of doing business, as set out in the complaint, under which contracts are entered into between the plaintiff and its wholesale jobbing distributers, and between plaintiff and retail druggists and other persons, firms, or corporations selling the Factor products in the state of California, by the terms of which contracts the distributers are obligated to sell these products only to retailers who will resell the same at specified prices, and who, in turn, have entered into a written contract with the plaintiff Sales Builders, Inc., to sell the Fac-

tor products at the specified prices. The prices fixed and established by plaintiff Sales Builders, Inc., in said contracts, it is alleged, are fair and reasonable, and no higher than is required to yield to distributers at wholesale and retail a reasonable compensation for their services. It is also alleged that, as known to defendant, practically all of the wholesale druggists in the state of California have executed these wholesale distributers' contracts, and practically all of the retail druggists in the state of California, including the prominent department stores dealing in cosmetics and toilet articles, have executed the retail distributers' contracts, and are observing and conforming with the terms of the contracts. Price-cutting on products of plaintiff Max Factor & Co. has ceased, and plaintiff Sales Builders, Inc., is enjoying, under the terms of the California Fair Trade Act, a reasonable profit from the sale of its goods, and immunity from destructive and uneconomic price-cutting. The distribution of its goods has been unobstructed, and its business has been greatly benefited.

However, the defendant, a retail distributor of plaintiffs' goods, is engaged in selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of the commodities to the defendant, with the result that other dealers are forced to meet defendant's price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendant. Sales Builders, Inc., upon inauguration of its system of contracts heretofore referred to, tendered to defendant a contract and an opportunity to deal in plaintiffs' goods on the same terms offered to every other retail dealer in the commodity in the state of California. The defendant refused and declined to execute the contract or to conform to the system of distribution employed by Sales Builders, Inc., or to observe the sales price fixed in the contract.

The plaintiff Sales Builders, Inc., declined, and has continued to decline, to sell its commodities to the defendant unless and until the defendant enters into the tendered contract with plaintiffs. Defendant has proceeded, and is proceeding, to carry out the alleged unlawful and wrongful scheme, and, it is alleged, in so doing has been, and is, acting maliciously and without legal justification therefor. In pursuance and as part of the wrongful and unlawful plan

and scheme, defendant, unbeknown to plaintiffs, has procured, and continues to procure, commodities manufactured by Max Factor & Co. bearing the trade-marks, brands and names of Max Factor & Co., and has sold, and is now selling, the commodities at prices less than the retail sales prices which are being sustained by substantially all of the retail dealers in cosmetics and toilet articles in the state of California. Defendant has been, and now is, engaged in informing retail dealers under contract with plaintiff Sales Builders, Inc., as well as the public generally, of defendant's intention to sell plaintiffs' goods at cut-rate prices, which act and the others in the complaint complained of are unduly influencing retail and wholesale distributers of Max Factor & Co.'s products; and the wholesale and retail distributers have complained that they will be compelled to cancel the contracts with plaintiff Sales Builders, Inc., and to sell the Max Factor & Co. products not in conformity with the terms of the contracts entered into by them, but at prices which will meet those announced by the defendant, and at which prices the defendant sells at retail the Max Factor & Co. products. The result of such cancellation, it is claimed, will be the destruction of the business of plaintiffs and the goodwill pertaining thereto.

It is further alleged that the defendant threatens to, and will, unless restrained by judgment of court, continue to sell and dispose of the products of the plaintiff Max Factor & Co. at retail prices less than the retail sales prices regulated by plaintiffs, the continuance of which acts will produce great and irreparable injury to plaintiffs in that it will be extremely difficult, if not impossible, to ascertain the amount of damage that will afford plaintiffs adequate relief for the loss of sales and the destruction of business of plaintiffs and the goodwill pertaining thereto. For these reasons, plaintiffs seek equitable relief by way of injunction against the wrongs complained of.

To the complaint containing the foregoing allegations, defendant interposed a general demurrer, which the trial court sustained without leave to amend. Judgment was thereupon entered for the defendant, and the plaintiffs have appealed, presenting the single question: "Is section 1½, added to the Fair Trade Act of the state of California in 1933 (Stats. 1933, p. 793, supra), constitutional?"

The title of the Fair Trade Act as passed in 1931 indicates its purpose. It is as follows: "An act to protect

trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name." (Stats. 1931, p. 583.) In its entirety, the act aims at preventing price-cutting of articles sold under a trade or brand name, or under a trade-mark. As amended in 1933 (Stats. 1933, p. 793), section 1½ provides, in order to accomplish the above purpose, that all retailers, whether the goods were originally sold to them under a contract fixing the resale price or not, who have knowledge of such contracts of resale, must sell at not less than the fixed price. It is respondent's main contention that such a statute violates the due process and equal protection clauses of the federal and state constitutions, in that it denies to him the liberty and freedom of contract.

We think there are certain fundamental concepts which are decisive of the present case:

1. In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, price-cutting. The Sherman and Clayton Anti-Trust Acts passed by congress, and the Cartwright Act passed by our state legislature, and [fol. 26] many other similar statutes, are indications that the particular legislatures involved, at the time such statutes were passed, were of the view that, from a social standpoint, free and open competition was desirable. The basis of this view is that, in the long run, it is against public interest to allow the manufacturer, producer, or distributer to fix the resale price of an article. In recent years, there has developed, in opposition to the above views, the concept that a manufacturer of a trade-marked article that is sold in competition with articles of a similar nature and who has fixed a fair price at which he, as well as his distributer and retailer, can make a fair profit, has a property right in the goodwill towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to use it in a misleading way to deceive the public. The basic theory on which this concept rests is that,

from a social standpoint, price-cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products. This latter protection is found in section 2 of the present act, which prohibits manufacturers contracting between themselves to fix the resale price.

As already indicated, the state legislature, by the adoption of the Cartwright Act, supra, adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy, and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the legislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. In the recent case of Nebbia v. New York, 291 U. S. 502, at page 537, 54 Sup. Ct. Rep. 505, Mr. Justice Roberts, speaking for the majority of the court, said:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satis-

fied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' (Northern Securities Co. v. United States, 193 U. S. 197, 337-8.) And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at

large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 33 Sup. Ct. Rep. 66, Mr. Justice Holmes stated:

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

As was said in In re Lasswell, 1 Cal. App. (2d) 183, 188, 36 Pac. (2d) 678:

"It is a salutary doctrine that statutes should be sustained by the courts wherever and whenever this is reasonably possible. It is the purpose, right and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status."

2. In the second place, it must be kept in mind that the [fol. 27] present statute is one passed in the exercise of the state's police power, and so differs fundamentally from statutes passed by the federal government. The latter is, of course, limited by the powers enumerated in the Constitution, while the states are not subject to such limitation. When the statute is viewed from the standpoint of police power, it is at once apparent that it is not a complete answer to the question of constitutionality to merely point out that the statute restricts a retailer from selling property of a certain class owned by him at prices fixed by himself, and so, of course, restricts his freedom of contract. There is no constitutional right to own property, as such, free from regulation. That a state statute deprives a person of a

right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, or buy what he pleases, or sell what he pleases at prices fixed by himself, does not per se brand the statute as unconstitutional. The process of civilization has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good. As society has become more complex, the necessity for such regulation has become more acute. Neither the state nor the federal constitution guarantees any person absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good—an equal liberty rather than an absolute liberty. In Jacobson v. Massachusetts, 197 U. S. 11, 26, 25 Sup. Ct. Rep. 358, this principle is expressed as follows: "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In holding a state statute constitutional which provided that all employees should be paid in cash and paid semi-monthly, and that such regulation should apply even to existing contracts, the United States Supreme Court, in Erie R. R. Co. v. Williams, 233 U. S. 685, 699, 34 Sup. Ct. Rep. 761, stated:

"The legislation having been passed in the exercise of the reserved power of the state, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of

this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Under its police power, the state, in a proper case has the power, acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, supra, which regulates the rights of a manufacturer or producer, and limits his freedom of contract, indicates this power exists.

The fact that a statute limits the rights of the owner of property, lowers its value, or limits its use, or limits the right of free bargaining in other ways, does not, of itself, determine the validity of the enactment. There are innumerable illustrations of statutes, passed under the police power, which interfere with the right of free bargaining which have been upheld on the theory the regulation is in the public interest. There are limits to this power, of course, but within those limits the legislature is supreme. These limits cannot be fixed by precedent. As the state progresses, the police power, within reason, develops to meet the changing conditions. (Miller v. Board of Public Works, 195 Cal. 477, 484, 234 Pac. 381; People ex rel. v. Associated Oil Co., 211 Cal. 93, 100, 294 Pac. 717.)

Many illustrations of the power of the state to regulate, in the public interest, the right of free bargaining could be given. The United States Supreme Court has held that a legislature may (1) fix the charges the owners of grain elevators and warehouses may make (Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468); (2) fix the charges of insurance companies (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. Rep. 612); (3) fix the time within which the services of employees must be paid for and provide for semi-monthly payments of wages, and prohibit contracts varying the times of payment (Erie R. R. Co. v. Williams, 233 U. S. 685, 34 Sup. Ct. Rep. 761); (4) fix the fees chargeable by attorneys appearing for employees before workmen's compensation commissioners (Yeiser v. Dysart, 267 U. S. 540, 45 Sup. Ct. Rep. 399); (5) fix the rate of pay for overtime work (Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. Rep. 435); (6) establish maximum hours of labor for men in certain industries (Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383); (7) establish maximum hours of labor for women (Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. Rep. 324; Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. Rep. 342); (8) prohibit the payment of wages in advance (Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. Rep. 821); (9) require loaves of bread of only a certain size be sold (Schmidinger v. Chicago, 226 U. S. 578, 33 Sup. Ct. Rep. 182); (10) establish maximum rentals (Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. Rep. 458; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. Rep. 465); (11) fix the maximum rate of interest chargeable on loans (Griffith v. Connecticut, 218 U. S. 563, 31 Sup. Ct. Rep. 132); (12) regulate the net weight of retail packages (Armour & Co. v. North Dakota, 240 U. S. 510, 36 Sup. Ct. Rep. 440); (13) declare sales of commodities on margin or for future [fol. 28] delivery void (Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425); (14) forbid unfair competition by charging of lower prices in one locality than those exacted in another (Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 Sup. Ct. Rep. 66); (15) fix the retail price of milk (Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. Rep. 505).

In each of the above cases the police power of the state was held broad enough to warrant an interference with free bargaining. As was said by Chief Justice Hughes in

Miller v. Wilson, supra, at page 380, "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

The police power is no longer limited to measures designed to protect life, safety, health, and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity (People ex rel. v. Associated Oil Co., supra; Chicago, B. & Q. Ry. v. Illinois, 200 U. S. 561, 26 Sup. Ct. Rep. 341), and includes economic measures regulating competition. (Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. Rep. 436; Nebbia v. New York, supra.)

The above cases conclusively establish that there is no absolute right of free bargaining guaranteed by the Constitution. Since, under the proper circumstances, the right of free bargaining can be, and in the past has been, regulated, it necessarily follows that, in a proper case, this power to regulate free bargaining includes the power to regulate the price. Every one of the cases above cited, and many more that could be cited, illustrate the breadth of the power invested in the state legislature to affect the terms of a business bargain between individuals, and in every case the regulation affected the price. As was said in the Nebbia case, supra (p. 532): "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. (Munn v. Illinois, 94 U. S. 113.)"

Respondent seriously urges that the legislature can only regulate prices as to those articles "affected with a public interest". There are several answers to this contention. As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producer, distributer

and retailer. Moreover, the statute does not attempt to regulate the price of any one article. It may be that when the legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification. Another complete answer to this contention is that if the purchase and sale of any one article or entire class of articles is subject to regulation under the police power, for reasons already stated, then its purchase and sale does affect the public interest. This was the exact holding in the Nebbia case, supra, where, at pages 533 and 536, it is stated:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression. * * *

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest', and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon a proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The next major factor that must be emphasized is that the statute here involved is not solely a price fixing or regulating statute. It is true that the statute permits the producer to fix by contracts with his disributer, and the latter by contracts with retailers, the minimum resale price of

the product, and that by section 1½ of the act the minimum price so fixed is made binding on all retailers who have knowledge of the contracts, and in this sense it is a price regulating statute. However, to regulate prices as such was not the main purpose of the statute. The statute only applies to certain articles sold under the trade-name or brand or trade-mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a good-will in connection with the articles, which good-will is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least, on the reputation built up by the owner of the trade-mark, brand or trade-name. Moreover, section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price. The statute, as its title indicates, by preventing price-cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. (Lumley v. Gye, 2 El. & Bl. 216. The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute.

(4) Another important factor that must be kept in mind is that in so far as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the act merely embodies a rule of law well settled in this state. In Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745, and in D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041, it was held that as far as articles in intrastate commerce [fol. 29] are concerned, without statutory authorization the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act, supra.

When the above concepts are applied to section 1½ of the Fair Trade Act, we have no hesitancy in holding that the section is constitutional. The object sought to be attained is clearly within the sphere of state regulation, and the means provided in the statute have a reasonable relation to this object. In our opinion the statute is neither arbitrary nor discriminatory.

California apparently is the first state to have passed a statute containing the provisions found in section 1½ of the Fair Trade Act. New Jersey, in 1916, however, passed a statute that permitted the manufacturer to fix the resale price of a trade-marked article, or article sold under a trade or brand name, by attaching a notice fixing the resale price to the container in which the article was sold. The resale price so fixed was made binding on all retailers. In Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq. 222, 101 Atl. 1030, 89 N. J. Eq. 332, 108 Atl. 128, the New Jersey court, in two opinions, held the statute constitutional on substantially the same reasoning set forth in this opinion.

Since the oral argument and submission of the cause, respondent has cited a decision of the New York court of appeals, in which that court held the New York Fair Trade Act unconstitutional. (Doubleday, Doran & Co., Inc., v. R. W. Macy & Co., Inc., decided January 7, 1936, — N. Y. —, 199 N. E. 409.) Because the New York act was copied almost verbatim from the California statute, respondent cites the opinion of the New York court as "strongly persuasive" We are not prepared to share counsel's optimistic view of the weight to be given the decision. While, on first impression, it seems entitled to the importance attached to it by respondent, we are of the view that, upon careful analysis, it loses its persuasive force. A brief discussion of the decision will, we believe, be helpful in throwing in relief some of the highlights of the situation now before this court. For several reasons, the decision of the New York court impresses us as not being in point in the discussion here. It is expressly limited to a declaration that section 2 of the New York act (identical with section 1½ of the California act) is unconstitutional "as applied to the facts set forth", which are different from those of the case now before this court. The plaintiffs in the New York case were Doubleday, Doran & Company, Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers.

The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to "the price which they [the plaintiffs] stipulated as a retail price in a *contract between themselves.*" Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual setup in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributers, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributer to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributers have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and

the extent of the execution and compliance with their terms by the trade, has obtained Factor products "unbeknown" to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here. In place of a single pretended contract made by the producer with itself, we have here a uniform system of contracts applied generally to wholesale and retail distributers in the state. In place of a voluntary sale without restriction by the producer to a retailer, there is here a consistent refusal by the producer or owner to sell to the defendant or to any other buyer who will not agree to maintain resale prices. A retailer who has been given an opportunity to enter into the contract has refused to do so, and, having obtained goods, not from the producer or owner, but indirectly and without the consent or knowledge of the producer, is engaged in cutting prices of the products. The New York decision does not discuss the fundamental basis and purpose of the legislation represented in the California Fair Trade Act, and does not disclose the ground upon which the section of the New York act, as interpreted for the purpose of the decision, is unconstitutional. We cannot find, in this casual treatment of a constitutional question, sufficient justification for regarding the decision as applicable to the facts here.

Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good-will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market. (See *Borden's Farm Products Co.* v. *Ten Eyck, Commissioner,* decided by the United States Supreme Court, February 10, 1936.)

[fol. 30] The contention made by the respondent that the Fair Trade Act attempts to regulate interstate commerce,

and so is unconstitutional, is without merit. The allegations of the complaint clearly establish that as to the transaction now before the court it is one arising and involving goods wholly located within this state. Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial exent of the legislature's powers. (California Adjustment Co. v. Atchison, Topeka & Sante Fe Ry. Co., 179 Cal. 140, 175 Pac. 682; American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. Rep. 511.)

Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. Rep. 106). The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable.

It is beyond denial that, under our form of government, the use of property and the making of contracts are normally matters of private concern. Here, no question of impairment of existing contracts is involved. No criminal proceedings have arisen under the circumstances of the case. The plaintiffs are seeking, in a civil action, to restrain conduct on the part of the defendant which the legislature, in determining a question of economic policy, has declared to be "unfair competition, and actionable at the suit of any person damaged thereby". We are of the view that its action, measured by the yardstick of the cases cited, and other authorities of similar import, must be held to be free from constitutional objections, and, not being shown to be unreasonable or arbitrary, it must be sustained as a proper legislative declaration of the policy of the state on the practice of price-cutting. The demurrer of defendant to the complaint should have been overruled.

For the foregoing reasons, the judgment entered on the order sustaining the demurrer without leave to amend is reversed.

Waste, C. J.

We concur: Curtis, J. Langdon, J. Seawell, J.

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IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION

I dissent. I cannot bring myself to agree with the majority opinion in this case. The question herein is not whether the court or the legislature is authorized to determine the wisdom of an economic policy. It is, of course, elementary that it is beyond the function of the court to attempt to define or limit the economic policy or to determine the wisdom of a chosen course by the state. And it is also fundamental that simply because such determination does not fall within the judicial function it does not follow that it belongs in the legislative field. It may be reserved by the state Constitution to the people, or the state may be prevented from acting by the inhibition of the federal Consitution. The question, then, in this case may be phrased as follows: Has the legislature exceeded its powers as limited by some inhibition of the Constitution in which the people have defined for themselves an economic policy and in which they have set up a safeguard against the infringement by the legislature of some natural right with which they are endowed? If the act in question exceeds the legislative power thus measured, it is likewise beyond the judicial function to sap the inhibition or safeguard of its essential vitality, by construction, in order to accomplish or permit a course of action the court may deem to constitute a wise economic policy. (See opinion of Mr. Justice Burnett in Ex parte Newman, 9 Cal. 502, 510, for a comprehensive statement of this principle.) The respondent insists that the section brought under our scrutiny in this cause does do violence to sections 1 and 13 of article I and section 25 of article IV of our state Constitution, as well as the fourteenth amendment to the federal Constitution. It seems to me the argument in this regard is unanswerable. Section 1 of article I reads as follows: "All men are by nature free

and independent, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness." Section 13 of the same article provides that no person shall "be deprived of life, liberty or property without due process of law", which is, of course, in keping with a portion of the fourteenth amendment to the federal Constitution. Section 25 of article IV forbids the enactment of special laws respecting enumerated subjects or where a general law can be made applicable.

Sections 1 and 13 of the first article have been considered by this court in previous cases, and I believe if the amendment under attack is to be sustained, they must be directly overruled or the court forced to the extent of saying all trade-marked goods, including the specific item of cosmetics here involved, have been so devoted to a public use that they have become "affected with a public interest". I can scarcely believe that anyone would adopt the latter alternative. Hence I advert to the construing authorities. It was held in the early case of Ex parte Newman, to which I have already referred, that the declaration of principles contained in article I, and which were intended for the protection of every individual, "can be enforced by judicial determination". In Ex parte Quarg, 149 Cal. 79, this court proceeded to enforce the section upon which the respondent relies for his protection. With respect to an enactment which attempted to prohibit the sale of theater tickets at a price in excess of that originally charged, it is there said: "The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, *it includes the right to dispose of such property* in such innocent manner as he please, and *to sell it for such price as he can obtain in fair barter*" (italics added). To the same practical effect is Ex parte Dickey, 144 Cal. 234, in which we find this expression: "This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed pro-

tection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived [fol. 31] of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations." (See, also, In re Smith, 193 Cal. 337.) Again in People v. Pace, 73 Cal. App. 548, after approving the language which we have quoted from Ex parte Quarg, it was held that the legislature could not require a person to secure a permit as a condition precedent to the sale of his own stock, although in repeated and successive transactions. The court said: "In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts in the exercise of the particular functions imposed upon them by the Constitution, should scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. (Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18, see, also, Rose's U. S. Notes; Pacific Palisades Ass'n. v. City of Huntington Beach, et al., 196 Cal. 211, 40 A. L. R. 782, 237 Pac. 536.)"

There are a host of authorities from other jurisdictions which might be cited to the same effect, but for my purposes it will be sufficient to refer to but two. First we find comparable language in the case of Tyson Bros.-United Ticket Office v. Branton, 273 U. S. 418, as follows: "In the endeavor to reach a correct conclusion in respect of this inquiry it will be helpful by way of preface to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, case of the State Freight Tax, 15 Wall. 232, 278; and as such, within the protection of the due process of law clauses of the fifth and fourteenth amendments. See City of Car-

rollton v. Bazzette, 159 Ill. 284, 294, 31 L. R. A. 522, 42 N. E. 837." Second I refer to Doubleday, Doran & Company, Inc. v. R. H. Macy & Co., Inc., 199 N. E. 409, which case involved a practically verbatim copy of the section here involved, adopted by the legislature of New York. Bearing in mind that the New York Court of Appeals was the same court which first sustained the New York Milk Control Act (People v. Nebbia, 262 N. Y. 259), which was the subject of judicial inquiry in the case of Nebbia v. New York, from which the majority opinion has quoted so extensively, the expressions we find in the case are especially illuminating. It is there said: "That the States cannot fix the selling price of any and all commodities has been settled. (Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; Tyson & Bro. v. Banton, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 128; Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 S. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E., 1196, Ann. Cas. 1918A. 955.)

"Books, at least these books, are not 'affected with the public interest' any more than theater tickets. No emergency has yet arisen in literary publications and the business is not such as comes within the class which must submit to rate fixing. Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers. Under the Nebbia case, for instance (Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469), no one would doubt now that New York state would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such a case. So we thought in People v. Nebbia, 262 N. Y. 259, 186 N. E. 694, but to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation. What the Legislature cannot do directly, it cannot do indirectly, nor does it cease

to be a price fixed by the Legislature because that body has clothed the publisher with the power or authority to establish it." I think it so fundamental and so well established that the right to sell at any price obtainable by the owner is a part of the property itself and within the protection of the constitutional guaranties that I shall not devote more space to that thought.

However, it must be considered that there is a factor which takes some kinds of businesses outside of the strict protection of the inhibition, and to an ascertainment or rather statement (because it has heretofore been well explained and adhered to) of that element I now turn. What is it? For the purposes of a ready statement we say that where a business is "affected with a public interest" it is subject to regulatory measures. Just what is meant by the expression is well stated in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 535, as follows: "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes.

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of ins, cabs and grist mills. (State v. Edwards, 86 Mo. 102, Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254.)

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Again it is said therein (p. 536): "In a sense, the public is concerned about all lawful business because it contributes [fol. 32] to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

Making the meaning of the unanimous court still more clear, the author of the opinion says (p. 537): "An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes United States v. Trans-Missouri Freight Association, 166 U. S. 290, 320; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, it usually distinguishes private from quasi-public corporations.

"In nearly all the business included under the third head above, the thing which gave the public interest *was the indispensable nature of the service and the exorbitant charges and the arbitrary control to which the public might be subjected without regulation.*" (Italics added.)

To revert to the case of Tyson & Bro. v. Banton, supra, for a moment we find apt language describing the expression as follows (p. 430): "The authority to regulate the conduct of a business or to require license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance.

Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood.''

It can hardly be denied that the public is interested in the maintenance and continuity of the oil business, particularly as the same relates to the sale of gasoline and lubricating oils. And yet the Supreme Court of the United States denied the power of the legislature to regulate the price in the case of Williams v. Standard Oil, 278 U. S. 235, 239, saying in part as follows: ''It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' * * * By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. * * *

''In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from

a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.'" I might add other authorities in which the legislative power has been denied, but there has never been a departure from the announced principle. Even in the case of Nebbia v. New York, supra, to which reference has been made, the court justifies its conclusion by the fact that milk was indispensable and that it was easily contaminable; that in order to secure pure and wholesome milk for the public during the emergency which the legislature declared to exist it was necessary for the state to take control. The facts of the case when studied reveal that the comfort claimed to be found by appellant in the opinion does not in truth exist. And here I desire to point out a fallacy involved in the majority opinion. The language quoted is taken from cases involving businesses "affected with a public interest" as hereinbefore defined, or from authorities dealing with the health or public safety. The result is that the language, lifted from its context and placed in a different setting, takes on a meaning altogether foreign to that which it originally possessed.

Nor can it be seriously contended that the amendment is not a price-fixing statute. It fixes the price indirectly and it has this additional vice, that it leaves the fixed price to the dictates of the producer—in other words, the legislature has, as said in the Doubleday-Doran case, attempted to delegate authority to the producer of a trade-marked article to set the retail price. No one can object to the contract which he may enter into, but to make this contract binding by legislative fiat as to retail price upon persons who are not privy thereto violates every principle guaranteed the individual by the constitutional guaranties. The element of knowledge on the part of the seller is a minor factor, provided very simply by notice on the goods or label. It is manifest that the act here in question was not based upon the public interest, or that the consumer was considered. Its effect is to grant to the producer a privilege and preference unwarranted by the basic law. Not only that—but seeking to justify its enactment upon the theory that it is designed to prevent price cutting which injures a competi-

tor, it reaches all merchants who, though they may be satisfied with a smaller profit than others engaged in the busi- [fol. 33] ness, or who by reason of a greater efficiency are able to sell at lower prices and yet make the same profit, are still compelled to exact from the consumer a fixed retail price. It strikes at every merchant alike, regardless of intention, who desires to manage and control his own business. It is thus made perfectly clear that the object of the act is not to prevent unfair competition but to fix prices. Such being its purpose and operation, it falls under the condemnation of cases involving similar efforts, such as Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, and the other cases already cited.

But the amendment has other fatal defects. A study of the authorities which deal with the regulation of businesses, both those which sustain and those which reject the claim of legislative power, reveals that the question of whether all the surrounding circumstances have operated to change the status of a private business free from legislative regulation into one in which the public has an interest is one for judicial inquiry and determination (Wolff Packing Co. v. Court of Industrial Relations, supra). But the act here in question attempts to lump all businesses into a common regulatory basket, provided only that the product is trademarked and is originally in competition.

I have already mentioned the fact that the legislature has attempted to delegate the price-fixing power to the producer or manufacturer. Before concluding, I wish to direct attention to the almost obvious and inescapable fact that there is no authority in the law for such action. A person may not be bound with respect to his property by the action, whim or caprice of another, particularly where the latter is not vested with any official responsibility or duty. The delegation of such power is contrary to the fourteenth amendment to the federal Constitution. (Washington v. Roberge, 278 U. S. 116; Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. Rep. 241.) Of course, I concede the producer's right to sell or not to sell at his own price, but when his property has been sold and passed into hands not hampered by contractual covenants the producer's control and right therein has altogether ceased. It takes no great amount of imagination to visualize the discriminatory prac-

tices and abuses which might be indulged were the power of the producer to establish a fixed retail price upheld.

Since the preparation of the foregoing opinion I have read the dissenting opinion by Mr. Justice Shenk and desire to express my concurrence therein.

The judgment should be affirmed.

Thompson, J.

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IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION

In concurring in the dissent of Mr. Justice Thompson I desire to comment on certain matters not touched upon in his opinion. In the first place let me point out that the particular statute under attack should not be confused with the Unfair Practices Act of 1935 (Stats. 1935, p. 1546), which denounces unfair competition and so-called piratical trade transactions, and was designed to afford full relief against such abuses on behalf of anyone aggrieved. That act is said to have been passed at the behest of the business interests of the state, including the manufacturer, middleman and retailer. While the validity of that statute has not been passed upon by this court is is enough to say for present purposes that it appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws.

The act now under attack as originally passed in 1931 was confined to the field of contract in the fixing of prices by agreement as between manufacturer, jobber and retailer, and when so limited no valid objection to it has been pointed out. It is the amendment of 1933 which makes the prices so fixed binding on all who are not parties to the contract. In other words, it places within the power of the manufacturer or producer to fix the retail price of all commodities regardless of their reasonableness. It does not purport to denounce unfair competition alone, but affects fair competition as well. Carried to its length it would enable the manufacturer or producer to destroy all competition and thus place the consumer at their uncontrolled

mercy even as to food, clothing and all commodities which are the subject of manufacture or production. This, too, without regard to serious marketing problems which have confronted some of the basic industries of the state. It is said that whether these results should follow is an economic problem with which the courts have nothing to do. But it is the business of the courts to see to it that, in carrying out any such program, the fundamental and guaranteed rights of the citizen to deal with his property as he chooses, subject to such reasonable regulations as may properly be imposed, are not destroyed. The statute under attack does not regulate. It prohibits. It is essentially a price-fixing statute. To me it is beyond question that the legislature itself could not fix the retail prices of all or any commodities not affected with a public interest or clothed with a public use. We are bound by the decisions of the Supreme Court of the United States on that subject, as pointed out in the opinion of Mr. Justice Thompson. If the legislature itself is without power to fix the retail price of such commodities, how then can it delegate that power to one who is governed by no power except his own self interest?

It is said in the majority opinion that the statute under attack is confined to retail prices of trade-marked or branded commodities; that this is a valid classification and that the legislature has the right to single out commodities so marked as a proper subject of preferment. This is not so, for the reason that there is no limitation on the acquisition of trade-marks and brands, except the ingenuity, or lack of it, but aided by prize contests, on the part of the manufacturer or producer in conjuring up names to suit his purposes. He then may acquire an exclusive right to the name under sections 3196-3202 of the Political Code. Under this easy plan all commodities, essential or otherwise, may be trade-marked or branded. It does not follow that because the right to the use of the name is exclusive, the right to shackle the commodity with a retail price is vested in the owner of the name regardless of where the commodity may find itself in the channels of trade, divorced from any contractual relation with the owner of the name.

As to the price-fixing feature of the statute the highest court in the land has spoken in terms which I feel bound to respect. Also, the state of New York enacted the same statute now under attack. The highest court of that state

recently and correctly held it void under the Federal Constitution. In deference to what I deem to be the established law I arrive at the same conclusion.

Shenk, J.

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[fol. 34] IN SUPREME COURT OF CALIFORNIA

L. A. No. 14662. In Bank

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND MODIFYING JUDGMENT—March 26, 1936

By the COURT:

The petition for a rehearing is denied.

The judgment heretofore rendered is modified as follows: Strike out the last two lines in the opinion, and insert in lieu thereof, the following: "The judgment entered on the order sustaining the demurrer without leave to amend is reversed, and respondent having filed an election to stand on its demurrer, it is ordered that the trial court enter judgment in the within cause in favor of the appellants as prayed for in its complaint."

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[fol. 35] IN SUPREME COURT OF CALIFORNIA

LOS ANGELES

Bank. No. 14662

MAX FACTOR & Co. (a Corp.), and SALES BUILDERS, INC., (a Corp.), Plaintiffs, Appellants,

vs.

CLARENCE G. KUNSMAN, Defendant, Respondent

On Appeal from the Superior Court in and for the County of Los Angeles. Superior Court #363006

JUDGMENT—March 26, 1936

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all

and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of ——, in the above entitled cause, entered on the order sustaining the demurrer without leave to amend is reversed, and the respondent having filed an election to stand on its demurrer, it is ordered that the trial court enter judgment in the within cause in favor of the appellants as prayed for in its complaint. Appellants to recover their costs on appeal.

Clerk's certificate to foregoing paper omitted in printing.

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[fol. 36] [File endorsement omitted]

[fol. 37] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 11, 1936

To the Chief Justice of the Supreme Court of the State of California:

Your petitioner, Clarence K. Kunsman, respectfully shows:

That your petitioner is the appellant in the above entitled cause and the defendant and respondent in the case below. That on or about the 2nd day of January, 1934, appellees filed their amended complaint against appellant in the Superior Court of the State of California, in and for the County of Los Angeles, stating an alleged cause of action against appellant based upon his alleged violation of Section 1½ of a statute of the State of California, entitled "An Act To Protect Trademark Owners, Distributors and the Public Against Injurious and Uneconomic Practises in the Distribution of Articles of Standard Quality Under a [fol. 38] Distinguished Trademark, Brand or Name", which act is commonly known as the "Fair Trade Act" (Stats. of California 1931, Chapter 278, as amended by the addition of Section 1½ of said Act, Stats. of California 1933, Chap-

ter 260), and praying for an injunction to restrain appellant from continuing to violate said section of said Act. Said Act, as amended, will be hereinafter for convenience referred to as the "Fair Trade Act".

That appellant demurred to said complaint on the ground that it failed to state a cause of action, in that Section 1½ of the Fair Trade Act is unconstitutional and repugnant, both to the Constitution of the State of California and the Constitution of the United States, and, more particularly, that said amendment to said Act is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of property and liberty without due process of law. The Superior Court thereupon rendered a judgment in favor of appellant upon an order sustaining, without leave to amend, appellant's demurrer to appellee's complaint and refusing to issue the injunction prayed for, basing said judgment upon the ground that Section 1½ of the Fair Trade Act violates the Constitution of the State of California and also violates and is repugnant to the Fourteenth Amendment of the Constitution of the United States.

[fol. 39] That the appellees thereupon filed notice of appeal to the Supreme Court of the State of California, and briefs having been filed on behalf of appellees and appellant, the case duly came on for hearing before said Supreme Court of the State of California on September 11, 1935, at which time, after oral argument, the case was submitted to said Court for decision. That on February 27, 1936, said Supreme Court of the State of California rendered its decision in the above entitled cause, holding that Section 1½ of the Fair Trade Act was constitutional, both under the State and Federal Constitutions, and reversed the judgment of the trial court, entered on the order sustaining appellant's demurrer to the complaint, without leave to amend.

That on the 18th day of March, 1936, appellant filed with the Supreme Court of the State of California a petition for rehearing of said cause. That on the 25th day of March, 1936, appellant filed a supplement to said petition for rehearing in which appellant stated that he elected to stand upon his demurrer. That said petition for rehearing was denied by the Supreme Court of the State of California on

the 26th day of March, 1936, at which time said Court modified its opinion by ordering the trial court to enter final judgment for the appellees by reason of appellant's elec-
[fol. 40] tion to stand upon his demurrer.

That the Supreme Court of the State of California is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of a statute of the State of California on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates the Fourteenth Amendment of the Constitution of the United States.

That, therefore, in accordance with Section 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit: under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the
[fol. 41] jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of California, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of California may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of California, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the

security to be required of the petitioner, and that the supersedeas bond tendered by the petitioner be approved.

Dated At Los Angeles, California, this 5th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Petitioner.

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[fol. 42] [File endorsement omitted]

[fol. 43] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 11, 1936

Now comes the appellant in the above numbered and entitled cause and says that there are errors in the record and proceedings of the above entitled cause and for the purpose of having the same reviewed in the United States Supreme Court assigns the following errors in the record and proceedings in this cause:

1. That the Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, entered on the order sustaining appellant's demurrer to appellees' complaint, without leave to amend, and in thereby holding constitutional, Section 1½ of a statute of the State of California entitled "An Act to Protect Trademark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Distinguished Trademark, Brand or Name", which act is com-[fol. 44] monly known as the "Fair Trade Act" (Stats. of California 1931, Chapter 278, as amended by the addition of Section 1½ of said act, Stats. of California 1933, Chapter 260).

2. That the Supreme Court of the State of California erred in failing to render judgment in favor of appellant, affirming the judgment entered on the order of the trial court sustaining appellant's demurrer to appellees' complaint, without leave to amend.

3. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade

Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his property without due process of law.

4. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his liberty without due process of law.

Wherefore, on account of the errors hereinbefore as-[fol. 45] signed, petitioner prays that said judgment of the Supreme Court of the State of California in the above entitled cause, dated the 27th day of February, 1936, as modified by the order of said Court, dated the 26th day of March, 1936, be reversed and a judgment entered in favor of the appellant.

Dated this 5th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant.

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[fol. 46] [File endorsement omitted]

[fol. 47] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 11, 1936

The petition of Clarence G. Kunsman, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California, dated the

27th day of February, 1936, as modified and made final by the order of said Court, dated the 26th day of March, 1936, [fol. 48] as prayed in said petition, and that the Clerk of the Supreme Court of the State of California shall, within sixty (60) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is Further Ordered that the said appellant shall give a good and sufficient supersedeas bond, in the sum of

2500.00

W. H. W. Twenty-five Hundred Dollars ($[500.00]*), that said appellant shall prosecute said appeal to effect and answer all costs and damages if he fails to make his plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated this 11th day of May, 1936.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

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[fols. 49-53] Citation, in usual form, showing service on Henry Haves, filed May 18, 1936, omitted in printing.

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[fol. 54] [File endorsement omitted]

[fol. 55] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE AND STIPULATION AS TO RECORD—Filed May 18, 1936

To the Clerk of the Supreme Court of the State of California:

In accordance with Rule 10, paragraph 2, of the Rules of this Court, appellant herewith presents this præcipe to

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[* Matter in brackets struck out in copy.]

indicate the portions of the record to be incorporated into the transcript in this appeal.

1. The entire transcript of this case on appeal in the Supreme Court of the State of California, except the Clerk's certificates to the judgment roll and transcript, consisting, more particularly, of the following papers:

(a) The amended complaint with all exhibits thereto.
(b) Demurrer to amended complaint.
[fol. 56] (c) Minute order.
(d) Judgment.
(e) Notice of appeal.

2. Judgment and opinion in said case (including dissenting opinions) of the Supreme Court of the State of California.

3. Order of the Supreme Court of the State of California denying petition for rehearing and modifying judgment.

4. Petition for appeal to this Court.

5. Order allowing appeal to this Court.

6. Citation to appellees with proof of service.

7. Assignment of errors to this Court.

8. Statement of jurisdiction of this Court.

9. Proof of service and statement directing appellees' attention to Rule 12, Paragraph 3 of the Rules of this Court.

10. Supersedeas bond filed by appellant herein.

Dated this 13th day of May, 1936.

Respectfully submitted, Jules C. Goldstone, William Berger, Attorneys for Appellant.

[fol. 57] It is hereby stipulated by and between the parties in the above entitled cause that the papers herein enumerated shall be the portions of the record in this case to be incorporated into the transcript on this appeal.

Dated this 13th day of May, 1936.

Henry Haves, Attorney for Appellee. Jules C. Goldstone, William Berger, Attorneys for Appellant.

[fol. 58] [File endorsement omitted]

[fols. 59-129] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR INCLUSION OF ADDITIONAL PAPERS IN THE TRANSCRIPT ON APPEAL—Filed May 21, 1936

It is stipulated between the parties hereto, by and between their respective attorneys, that the following papers, in addition to those enumerated in the Præcipe heretofore filed herein, may be included in the transcript on appeal.

1. Copy of Remittitur.
2. Stipulation waiving supersedeas bond and approving Five Hundred Dollar ($500.00) cost bond.
3. Order dispensing with supersedeas bond and approving Five Hundred Dollar ($500.00) cost bond.
4. Cost bond.
5. Præcipe, with stipulation attached thereto, heretofore filed herein.
6. This stipulation.

Dated: This 20th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant. Henry Haves, Attorney for Appellees.

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[fol. 130] [File endorsement omitted]

[fol. 131] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION WAIVING SUPERSEDEAS BOND AND APPROVING $500.00 COST BOND—Filed May 21, 1936

It appearing that on May 11, 1936, an order was made herein, allowing an appeal by the above Appellant to the Supreme Court of the United States, and it further appearing that by the terms of said order Appellant was required to give a good and sufficient supersedeas bond in the sum of Two Thousand Five Hundred Dollars ($2,500.00), that said Appellant should prosecute said appeal to effect and answer all costs and damages if he failed to make his plea good, and it appearing that the parties hereto desire to

waive the requirement that Appellant shall give such supersedeas bond in connection with the allowance and prosecution of the within appeal; Now, Therefore,

It is Hereby Stipulated, that said supersedeas bond hereinabove referred to, be, and the same hereby is, waived, and that the appeal herein may operate as a supersedeas without the filing of such supersedeas bond; to the same force and *affect* as if such bond had been filed.

It is Further Stipulated, that a cost bond in the sum of [fol. 132] Five Hundred Dollars ($500.00) is satisfactory to the parties hereto and is hereby approved.

It is Further Stipulated that the Chief Justice of the Supreme Court of the State of California may make an appropriate order, pursuant to the provisions of this stipulation.

Dated this 20th day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant. Henry Haves, Attorney for Appellees.

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[fol. 133] [File endorsement omitted]

[fol. 134] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER DISPENSING WITH SUPERSEDEAS BOND AND APPROVING COST BOND IN THE SUM OF $500.00—Filed May 21, 1936

Upon reading the stipulation of the parties to the above action, waiving the supersedeas bond heretofore fixed in connection with the allowance and prosecution of the within appeal and approving a cost bond in the sum of $500.00, and good cause appearing therefor;

It is Hereby Ordered, that the supersedeas bond in the sum of Two Thousand Five Hundred Dollars ($2,500.00), heretofore fixed in the order allowing the appeal herein, be, and the same hereby is, dispensed with;

It is Further Ordered, that said order allowing the appeal be, and the same hereby is, amended so as to eliminate therefrom the requirement that Appellant shall furnish such supersedeas bond in connection with said appeal, and that said appeal shall operate as a supersedeas, to the same force and *affect* as if such supersedeas bond had been filed.

It is Further Ordered, that said Appellant shall give a good and sufficient cost bond in the sum of Five Hundred

Dollars, that said Appellant shall prosecute said appeal to [fol. 135] effect and answer all costs, if he fails to make his plea good.

Dated this 21st day of May, 1936.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

Service acknowledged, and approved as to form.
Dated this 20th day of May, 1936.

Henry Haves, Attorney for Appellees.

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[fols. 136-139] Bond on appeal for $500.00, approved and filed May 21, 1936, omitted in printing.

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[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

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[fols. 141 & 142] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed May 27, 1936

Comes now the appellant in the above entitled cause and adopts his assignments of error as his statement of the points to be relied upon and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated this 23d day of May, 1936.

Jules C. Goldstone, William Berger, Attorneys for Appellant.

[fol. 143] Service of the foregoing Statement of Points to be Relied upon and Designation of Parts of Record to be Printed is hereby acknowledged this 25th day of May, 1936.

Henry Haves, Attorney for Appellees.

[fol. 144] [File endorsement omitted.]

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Endorsed on cover: File No. 40617. California Supreme Court. Term No. 79. Clarence G. Kunsman, appellant, vs. Max Factor & Co., and Sales Builders, Inc. Filed May 25, 1936. Term No. 79, O. T., 1936.